IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 12TH FEBRUARY 2007 / 23RD MAGHA 1928

RFA.No. 46 of 2007()

AGAINST THE ORDER DATED 31/01/2006 IN FDA NO.584/1998 IN OS.494/1990 of I ADDL.SUB COURT,ERNAKULAM

APPELLANT. CR.PETITIONER NO.10:9TH DEFENDANT:

P.D.MOHANAN, S/O.LATE DATTA SHETTY,
PALAPARAMBIL HOUSE, PACHALAM, KOCHI-12.

BY ADVS. M/S.V.SIVASWAMY, V.V.ASOKAN AND S.AMINA

RESPONDENTS: PETITIONER & COUNTER PETITIONERS 4 TO 9 AND 11 TO 17: DEFENDANTS 11, 3 TO 8, 10,12 TO 17:

1. P.D.SYAMALA, D/O.LATE DATTA SHETTY,
CHOODATHUPARAMBIL HOUSE, 43/1001.
PACHALAM.P.O., KOCHI-12.

2. P.D.GOVINDA RAJAN, S/O.LATE DATA SHETTY,
C/O.RAJAKAMAL & SONS,THAMARAPARAMBIL, KOCHI-1.

3. P.D.SHAMMA, D/O.LATE DATTA SHETTY,
ALINGAPARAMBIL HOUSE, PACHALAM, KOCHI-12.

4. P.D.NIRMALA, D/O.LATE DATA SHETTY,
PALAPARAMBIL HOUSE, PACHALAM, KOCHI-12.

5. P.D.DAYANANDAN, S/O.LATE DATTA SHETTY,
SHEEBA NIVAS, PALAPARAMBIL HOUSE,
PACHALAM, KOCHI-12.

6. P.D.RAJAMMA, D/O.LATE DATTA SHETTY,
HOUSE NO.10/411, ATHANI HOUSE,
AMARAVATHY, KOCHI-1.

7. P.D.SAROJINI, D/O.LATE DATTA SHETTY,
CHITAYIL HOUSE, 5/416,
MARADY P.O., THRIPUNITHURA.

8. P.D.MANI, S/O.LATE DATTA SHETTY,
MALIYAM HOUSE, 44/973A,
VADUTHALA, KOCHI-23.

9. BHAGYAVATHY, PALAPARAMBIL HOUSE,
PACHALAM, KOCHI-12.

10. ROOPA, PALAPARAMBIL HOUSE,
PACHALAM, KOCHI-12.

11. RAJEEV, PALAPARAMBIL HOUSE,
PACHALAM, KOCHI-12.

12. RAJESH,PALAPARAMBIL HOUSE,
PACHALAM, KOCHI-12.

13. NARAYANAN, KIZHAKKEYYAMBAVELI,
PALLURUTHY, KOCHI-6.

14. RATHEESH, S/O.LATE JAYANTHI,
KIZHAKKEYYAMBAVELI,
PALLURUTHY, KOCHI-6.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 12/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T.SANKARAN,JJ.

R.F.A. NO. 46 OF 2007

Dated this the 12th day of February,2007

JUDGMENT

Sankaran, J.

The ninth defendant in O.S.No.494 of 1990, on the file of the Court of the Subordinate Judge of Ernakulam, challenges the final decree in the suit for partition. The suit was filed by the since deceased Sarada claiming partition. A preliminary decree was passed holding that the plaintiff is entitled to get 1/14 share in the plaint schedule property. It was held that defendants 1 to 11 are entitled to 1/14 shares each, defendants 12 to 15 together are entitled to 1/14 share and defendants 16 and 17 together are entitled to 1/14 share. Defendant No.11 filed I.A.No.584 of 1998 for passing the final decree. After the preliminary decree, the ninth defendant purchased the shares of defendants 1, 2 and 7 and thereby he became entitled to 4/14 shares.

2. In the final decree proceedings, an Advocate Commissioner was appointed to effect partition. There are properties described in A and B schedule in the preliminary decree which are available for partition. On a petition dated 26.11.2004, filed by the petitioner in the final decree application, the court below directed the Commissioner to submit report only in respect of A schedule property. The final decree is now passed only in respect of the plaint A schedule property. The Commissioner found that though the extent of plaint A schedule property as shown in the plaint is only nine cents, on actual measurement, the extent of the property is eleven cents. The Commissioner noticed that the A schedule property is bounded by compound walls on all the four sides. The entrance to the property is on the southern side. The property is situated very near to Pachalam junction. The Commissioner noticed that there are four buildings in the property. The westernmost building is a commercial building occupied by the ninth defendant and his wife, where they are running a garment unit. In

the tharavad house situated in the property, the ninth defendant is residing with family. On the eastern side of the tharavad house, there is a residential building with a single room which is occupied by one of the sharers, namely, P.D.Nirmala, who has sold her share in the properties to the eleventh defendant. The Commissioner also found an old two storeyed building, which was found to be dilapidated, beyond repair and unfit for use.

3. As per the order in I.A.No.1242 of 2004, the final decree court directed the Commissioner to divide the plaint A schedule property into three portions allotting 4/14 shares to ninth defendant, 8/14 shares to the tenth defendant and 2/14 shares to the eleventh defendant. The eleventh defendant submitted a statement before the Commissioner that her share can be allotted along with the shares of the tenth defendant. The tenth defendant had also no objection for this proposal. The parties agreed to allot the tharavad house to the ninth defendant. On the basis of these suggestions and consensus, the Commissioner divided the

properties into three plots, namely, A, B and C. Plot A having an extent of 1.334 cents and plot C having an extent of 5.63 cents were allotted to the group of defendants 10 and 11. Plot B having an extent of 4.036 cents was allotted to the ninth defendant (appellant herein). This plot takes in the tharavad house. It was found by the Commissioner that the share allotted to the ninth defendant takes in an excess extent of 894 sq.links and, therefore, it was suggested that he should pay owelty amount to the other sharers.

4. The appellant/ninth defendant filed objections to the Commissioner's report. It was contended that the Commissioner was not right in dividing eleven cents of property, since the decree schedule contains only nine cents in the A schedule. He raised a contention that the extent of two cents is in his possession and he has perfected his title by adverse possession and limitation.

5. The court below passed a final decree allotting plot A to the eleventh defendant, plot B to

the ninth defendant and plot C to the tenth defendant. It is recorded in the order that all the parties agreed to the division of the plaint A schedule property effected by the Commissioner and the parties agreed to the allotment of the plots A, B and C to the eleventh, ninth and tenth defendants respectively. Normally, in view of the consensus among the parties and the Court having passed an agreed order, the appellant would not be entitled to file an appeal challenging the final decree. It is submitted that there is no such consensus and the Court below was not justified in passing an agreed order. If there was no such agreement, the appellant should have moved the court below by filing a review petition. He has not resorted to such a course. We are of the view that the appellant is not entitled to raise a contention which he has now raised in the appeal in view of the order passed by the court below on agreement of the parties.

6. The court below also found that the plaint A schedule property has clear boundaries on all the four sides and the Commissioner was justified in dividing

the extent of land found within the boundaries. When there is a disparity between the boundaries and extent, it is well settled that the boundaries will prevail. When an item of the property is held to be partible and if that property is situated within well difined boundaries, the Commissioner is entitled to divide that property though the extent found on actual measurement is either less or more than that stated in the preliminary decree schedule. The Commissioner was fully justified in dividing the extent of eleven cents among the parties. As regards the contention of adverse possession and limitation, the same is not supported by sufficient pleadings or any sort of evidence. No evidence was adduced by the appellant before the court below. The case put forward in the objection to the Commissioner's report would indicate that the appellant is claiming adverse possession against one Kesavan. There is no case for the appellant at the preliminary decree stage that a portion of the plaint A schedule property belongs to Kesavan. Kesavan has no claim in respect of any portion of the plaint schedule property. The appellant

is not entitled to put forward such a contention in the final decree stage, he having not raised any such contention in his written statement and he having not invited the court to take a decision on that point at the preliminary decree stage. Moreover, the appellant has not adduced any evidence to substantiate his contentions.

In our view, the court below was fully justified in passing the final decree as is now passed by it. No grounds are made out by the appellant to interfere with the final decree passed by the court below. The appeal fails and it is dismissed.

(KURIAN JOSEPH)
Judge

(K.T.SANKARAN)
Judge

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